



RECEIVED

DEC 21 2012

N.C. ATTORNEY GENERAL
Environmental Division

State of North Carolina

Department of Justice

PO Box 629

Raleigh, North Carolina
27602

ROY COOPER
Attorney General

Francis W. Crawley
Phone: (919) 716-6600
Fax: (919) 716-6767
fcrawley@ncdoj.gov

December 20, 2012

D. J. Gerkin, Esq.
J. Patrick Hunter, Esq.
22 South Pack Square, Suite 700
Asheville, N. C. 28801-3494

CERTIFIED MAIL

Charles D. Case, Esq.
Craig A. Bromby, Esq.
P. O. Box 109
Raleigh, N. C. 27602

CERTIFIED MAIL

Re: Request for Declaratory Ruling on the Interpretation of 15A NCAC 2L .0106(c)

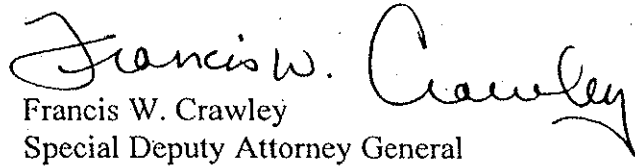
Dear Counsel:

You will find enclosed the Declaratory Ruling of the Environmental Management Commission regarding the application of regulation 15A NCAC 2L .0106(c) to coal ash ponds at electricity generating power plants. According to North Carolina General Statutes §150B-4 and §150B-45, your clients may seek judicial review of the Commission's declaratory ruling in the Superior Court by filing a petition within 30 days of receipt of a written copy of the final agency decision. A copy of the judicial review petition must be served on the Environmental Management Commission's agent for service of process at the following address:

William P. H. Cary, General Counsel
Dept. of Environment and Natural Resources
1601 Mail Service Center
Raleigh, N. C. 27699-1601

If you file a petition for judicial review, I request that you also serve a copy of the petition for judicial review on me at the above address. If you have any questions, please feel free to contact me.

Sincerely,


Francis W. Crawley
Special Deputy Attorney General

enclosure

cc: Kathryn J. Cooper, Esq., Special Deputy Attorney General
Donald W. Laton, Esq., Assistant Attorney General
Lois Thomas

STATE OF NORTH CAROLINA

BEFORE THE ENVIRONMENTAL
MANAGEMENT COMMISSION

COUNTY OF WAKE

In Re: REQUEST FOR)
DECLARATORY RULING ON THE)
INTERPRETATION OF 15A NCAC)
§ 2L .0106(c) WITH RESPECT TO)
COAL ASH LAGOONS)
)
CAPE FEAR RIVER WATCH, SIERRA)
CLUB, WATERKEEPER ALLIANCE,)
and WESTERN NORTH CAROLINA)
ALLIANCE,)
)
Petitioners,)
)
)

DECLARATORY RULING

THIS MATTER came before the Environmental Management Commission at its special called meeting on December 3, 2012, in Raleigh, North Carolina as a request for a declaratory ruling pursuant to G.S. § 150B-4 and 15A NCAC 2I .0602, et seq., by Petitioners Cape Fear River Watch, Sierra Club, Waterkeeper Alliance, and Western North Carolina Alliance. On or about October 10, 2012, Petitioners filed their Request for Declaratory Ruling with the Director of the Division of Water Quality on behalf of the Commission requesting the Commission clarify the application of rule 15A NCAC 2L .0106 to coal-fired electric generating facilities with coal ash ponds permitted prior to December 30, 1983, as described in the given factual situation set forth in the Petitioners' Request for Declaratory Ruling and in the Factual Stipulations filed jointly on November 2, 2012 by Petitioners and the Division of Water Quality.

On October 26, 2012, pursuant to 15A NCAC 2I .0602(d), the Chairman granted the motion to intervene by Duke Energy Carolinas, LLC and Carolina Power & Light Company, an indirect subsidiary of Duke Energy Corporation, d/b/a Progress Energy Carolinas.

Written arguments and responses were submitted by each party and oral arguments were presented to the Commission. Upon review of the record documents, submissions and arguments, the Commission makes the following:

FINDINGS AND CONCLUSIONS

1. Fourteen coal-fired power plants owned by Duke Energy Carolinas, LLC and Carolina Power & Light Company, an indirect subsidiary of Duke Energy Corporation, d/b/a Progress Energy Carolinas, operate unlined coal ash ponds (lagoons) for storage of coal combustion residue produced in the generation of electricity. The ponds contain a mixture of water, coal combustion waste and other waste.
2. The fourteen power plants were originally issued NPDES permits for the coal ash ponds pursuant to G.S. § 143-215.1 by the Department of Environment and Natural Resources (DENR) prior to December 30, 1983.
3. Prior to 2010, many of the fourteen facilities voluntarily monitored groundwater wells that were installed within the facilities' compliance boundaries. In December 2009, DENR requested groundwater monitoring wells be installed at the compliance boundary for each of the fourteen facilities.
4. Pursuant to the Division of Water Quality's request, well installation and groundwater monitoring began in 2010 and the majority of ground water monitoring wells are now installed at the compliance boundary of each facility.
5. Groundwater samples taken from certain monitoring wells at the fourteen facilities indicate the presence of some constituents in excess of the established groundwater standards.
6. The Department of Environment and Natural Resources has not required any of the fourteen facilities to take corrective action to address exceedances of groundwater standards

detected in monitoring wells located within the compliance boundary or to take immediate action to eliminate a source or sources of exceedances within the compliance boundary.

7. The Commission established a series of classifications and standards applicable to groundwaters of the State in Subchapter 2L of Title 15 of the Administrative Code in 1979. Title 15 of the Administrative Code was renumbered as Title 15A in 1989.

8. The rules in Subchapter 2L were amended in 1984 and 1989. The 1989 amendments included new sections for Corrective Action, 2L .0106, and Compliance Boundary, 2L .0107, and a definition for Compliance Boundary, 2L .0102(3). Rule 2L .0107(a) and (b) provide specific compliance boundaries for disposal systems permitted prior to and after December 30, 1983:

9. Sections 2L .0106 Corrective Action and 2L .0107 Compliance Boundary were amended again in 1992. The Corrective Action rule was changed by removing the SOC requirement from 2L .0106(c)(1) and (c)(2)(B) and adding authorization of a corrective action plan and schedule approved by the Director with input from the person or permittee submitting the plan. Rule 2L .0107 Compliance Boundary was amended to modify the compliance boundary requirements to allow permittees to maintain fixed environmental compliance boundaries after subdivision or conveyance of property within the compliance boundary.

10. Rule 2L .0106 Corrective Action was amended substantially in 1993 and section 2L .0106(e) was added. The revised rule is the current version, which is applicable to this Request for Declaratory Ruling, and provides in pertinent part:

.0106 CORRECTIVE ACTION

- (a) Where groundwater quality has been degraded, the goal of any required corrective action shall be restoration to the level of the standards, or as closely thereto as is economically and technologically feasible. In all cases involving requests to the Director for approval of corrective action plans, or termination of corrective

- action, the responsibility for providing all information required by this Rule lies with the person(s) making the request.
- (b) Any person conducting or controlling an activity which results in the discharge of a waste or hazardous substance or oil to the groundwaters of the State, or in proximity thereto, shall take immediate action to terminate and control the discharge, mitigate any hazards resulting from exposure to the pollutants and notify the Division of the discharge.
 - (c) Any person conducting or controlling an activity which has not been permitted by the Division and which results in an increase in the concentration of a substance in excess of the standard, other than agricultural operations, shall:
 - (1) immediately notify the Division of the activity that has resulted in the increase and the contaminant concentration levels;
 - (2) take immediate action to eliminate the source or sources of contamination;
 - (3) submit a report to the Director assessing the cause, significance and extent of the violation; and
 - (4) implement an approved corrective action plan for restoration of groundwater quality in accordance with a schedule established by the Director, or his designee. In establishing a schedule the Director, or his designee shall consider any reasonable schedule proposed by the person submitting the plan. A report shall be made to the Health Director of the county or counties in which the contamination occurs in accordance with the requirements of Rule .0114(a) in this Section.
 - (d) Any person conducting or controlling an activity which is conducted under the authority of a permit issued by the Division and which results in an increase in concentration of a substance in excess of the standards:
 - (1) at or beyond a review boundary, shall demonstrate, through predictive calculations or modeling, that natural site conditions, facility design and operational controls will prevent a violation of standards at the compliance boundary; or submit a plan for alteration of existing site conditions, facility design or operational controls that will prevent a violation at the compliance boundary, and implement that plan upon its approval by the Director, or his designee.
 - (2) at or beyond a compliance boundary, shall assess the cause, significance and extent of the violation of standards and submit the results of the investigation, and a plan and proposed schedule for corrective action to the Director, or his designee. The permittee shall implement the plan as approved by and in accordance with a schedule established by the Director, or his designee. In establishing a schedule the Director, or his designee shall consider any reasonable schedule proposed by the permittee.
 - (e) For the purposes of Paragraphs (c) and (d) of this Rule, an activity conducted under the authority of a permit issued by the Division, and subject to Paragraph (d) of this Rule, is one for which:
 - (1) a permit has been issued pursuant to G.S. 143-215.1;
 - (2) the permit was originally issued after December 30, 1983;
 - (3) the substance for which a standard has been exceeded outside the compliance boundary has been released to groundwater as a result of the permitted activity;
 - (4) all other activities shall for the purpose of this Rule be deemed not permitted by the Division and subject to the provisions of Paragraph (c) of this Rule.

- (f) Corrective action required following discovery of the unauthorized release of a contaminant to the surface or subsurface of the land, and prior to or concurrent with the assessment required in Paragraphs (c) and (d) of this Rule, shall include, but is not limited to:
 - (1) Prevention of fire, explosion or the spread of noxious fumes;
 - (2) Abatement, containment or control of the migration of contaminants;
 - (3) Removal, or treatment and control of any primary pollution source such as buried waste, waste stockpiles or surficial accumulations of free products;
 - (4) Removal, treatment or control of secondary pollution sources which would be potential continuing sources of pollutants to the groundwaters such as contaminated soils and non-aqueous phase liquids. Contaminated soils which threaten the quality of groundwaters must be treated, contained or disposed of in accordance with applicable rules. The treatment or disposal of contaminated soils shall be conducted in a manner that will not result in a violation of standards or North Carolina Hazardous Waste Management rules.
- (g) The site assessment conducted pursuant to the requirements of Paragraph (c) of this Rule, shall include:
 - (1) The source and cause of contamination;
 - (2) Any imminent hazards to public health and safety and actions taken to mitigate them in accordance with Paragraph (f) of this Rule;
 - (3) All receptors and significant exposure pathways;
 - (4) The horizontal and vertical extent of soil and groundwater contamination and all significant factors affecting contaminant transport; and
 - (5) Geological and hydrogeological features influencing the movement, chemical, and physical character of the contaminants.

Reports of site assessments shall be submitted to the Division as soon as practicable or in accordance with a schedule established by the Director, or his designee. In establishing a schedule the Director, or his designee shall consider any reasonable proposal by the person submitting the report.
- (h) Corrective action plans for restoration of groundwater quality, submitted pursuant to Paragraphs (c) and (d) of this Rule shall include:
 - (1) A description of the proposed corrective action and reasons for its selection.
 - (2) Specific plans, including engineering details where applicable, for restoring groundwater quality.
 - (3) A schedule for the implementation and operation of the proposed plan.
 - (4) A monitoring plan for evaluating the effectiveness of the proposed corrective action and the movement of the contaminant plume.

11. Rule 2L .0107 Compliance Boundary also was amended in 1993. The revised rule is the current rule and provides in pertinent part:

.0107 COMPLIANCE BOUNDARY

- (a) For disposal systems individually permitted prior to December 30, 1983, the compliance boundary is established at a horizontal distance of 500 feet from the

- waste boundary or at the property boundary, whichever is closer to the source.
- (b) For disposal systems individually permitted on or after December 30, 1983, a compliance boundary shall be established 250 feet from the waste boundary, or 50 feet within the property boundary, whichever point is closer to the source.
 - (c) The boundary shall be established by the Director, or his designee at the time of permit issuance. Any sale or transfer of property which affects a compliance boundary shall be reported immediately to the Director, or his designee. For disposal systems which are not governed by Paragraphs (e) or (f) of this Rule, the compliance boundary affected by the sale or transfer of property will be re-established consistent with Paragraphs (a) or (b) of this Rule, whichever is applicable.
 -
 - (j) Penalties authorized pursuant to G.S. 143-215.6A(a)(1) will not be assessed for violations of standards within a compliance boundary unless the violations are the result of violations of permit conditions or negligence in the management of the facility.
 - (k) The Director shall require:
 - (1) that permits for all activities governed by G.S. 143-215.1 be written to protect the quality of groundwater established by applicable standards, at the compliance boundary;
 - (2) that necessary groundwater quality monitoring shall be conducted within the compliance boundary; and
 - (3) that a violation of standards within the compliance boundary resulting from activities conducted by the permitted facility be remedied through clean-up, recovery, containment, or other response when any of the following conditions occur:
 - (A) a violation of any standard in adjoining classified groundwaters occurs or can be reasonably predicted to occur considering hydrogeologic conditions, modeling, or other available evidence;
 - (B) an imminent hazard or threat to the public health or safety exists; or
 - (C) a violation of any standard in groundwater occurring in the bedrock other than limestones found in the Coastal Plain sediments, unless it can be demonstrated that the violation will not adversely affect, or have the potential to adversely affect a water supply well.
12. Compliance boundary is defined in 15A NCAC 2L .0102(3) as "a boundary around a disposal system at and beyond which groundwater quality standards may not be exceeded and only applies to facilities which have received a permit issued under the authority of G.S. 143-215.1 or G.S. 130A."
13. Through evolution of the rules in 15A NCAC 2L .0100, *et seq.*, the terms "perimeter of compliance," and presently the "compliance boundary," identify the reference point at or beyond

which groundwater contamination that exceeds the groundwater standard is subject to the enforcement authority of the Director, which includes civil penalties, clean-up orders or injunctions.

14. The contemporaneous adoption of 2L .0106 Corrective Action and 2L .0107 Compliance Boundary in 1989 and the contemporaneous amendments to both rules in 1993, evidence no intent of the Commission to remove compliance boundaries for facilities permitted prior to December 30, 1983.

15. Subsection 2L .0106(d) of the Corrective Action rule sets forth requirements for corrective action applicable to persons conducting or controlling activities under authority of a permit where groundwater contamination exceeds the standards at the compliance boundary. Subsection 2L .0106(e)(1) through (3) in the Corrective Action rule specifies for corrective action required by 2L .0106(d) that a permitted activity is one which meets the requirements of 2L .0106(e), including the permit having been originally issued after December 30, 1983. 15A NCAC 2L .0106(e)(2).

16. Activities that do not meet the requirements of 2L .0106(e), including those permitted prior to December 30, 1983, are deemed unpermitted and are subject to the requirements of 2L .0106(c) applicable to persons conducting or controlling an activity (other than agricultural operations) that has not been permitted and which results in an increase in the concentration of a substance in excess of the standard.

17. The corrective action requirements in 2L .0106(c)(1) through (4) are not prioritized, and the immediate action to eliminate the source or sources of contamination requires responsible parties and the Division to follow the detailed procedures set forth in the entirety of the 2L Groundwater Rules.

18. The specific corrective actions enumerated in 15A NCAC 2L .0106(f)(1) through (4) that are required to be undertaken, including a site assessment and a corrective action plan for the abatement, containment or control of migration of any contaminants, require a reasonable amount of time to accomplish. The "immediate action" contemplated by 15A NCAC 2L .0106(c)(2) is action appropriate to the circumstances evaluated in the context of the 2L Groundwater Rules.

19. Interpreting the requirements of the 2L Groundwater Rules in *pari materia*, see Kyle v. Holston Group, 188 N.C. App. 686, 656 S.E.2d 667, disc. rev. denied, 362 N.C. 359, 662 S.E.2d 905 (2008), activities and facilities permitted prior to December 30, 1983, have a compliance boundary; therefore, the procedure for assessment and corrective action can be applied consistently for those facilities permitted both before and after this date and for those facilities never permitted. Until such time as a groundwater standard violation is noted at or beyond the compliance boundary, the corrective action requirements of 15A NCAC 2L .0106 are not triggered.

20. The compliance boundaries for coal ash facilities considered unpermitted for purposes of 15A NCAC 2L .0106 are an essential reference point to gauge the extent of any contamination and possible violation of the groundwater standards contained in 15A NCAC 2L .0200.

21. The compliance boundaries, as defined in 15A NCAC 2L .0102(3), for facilities permitted prior to December 30, 1983 are established by 15A NCAC 2L .0107(a) as the horizontal distance of 500 feet from the waste boundary or at the property boundary, whichever is closer to the source, and are the boundaries within which penalties will not be assessed, except for violations of permit conditions or negligent management. 15A NCAC 2L .0107(j).

23. For purposes of corrective action for facilities permitted prior to December 30, 1983, 15A NCAC 2L .0106 is silent on the issue of whether an exceedance of groundwater standards within the compliance boundary triggers the requirements of 15A NCAC 2L .0106(c). Reading the provisions of 15A NCAC 2L .0106 and 15A NCAC 2L .0107 together, groundwater standards must be met at the compliance boundary for enforcement and corrective action purposes, unless one or more of the conditions identified in 15A NCAC 2L .0107(k) is present.

24. Corrective action for a violation found at or beyond the compliance boundary incorporates measures found in 15A NCAC 2L .0106(c), (f), (g) and (h). It is not limited to the action in section 2L .0106(c)(2).

25. The Division of Water Quality has, over time, consistently interpreted and uniformly applied the term "compliance boundary" across the rules in 15A NCAC 2L .0100, et seq.

Based upon the foregoing Findings and Conclusions, the North Carolina Environmental Management Commission makes the following:

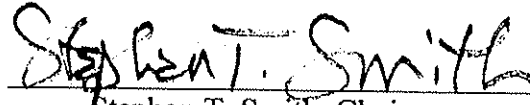
DECLARATORY RULING

For purposes of corrective action as provided in 15A NCAC 2L .0106(c), coal ash ponds permitted pursuant to N.C.G.S. § 143-215.1 prior to December 30, 1983, have compliance boundaries as provided by 15A NCAC 2L .0107(a), even though the facilities are deemed unpermitted under 15A NCAC 2L .0106(e)(4).

Operators of coal ash ponds permitted on or before December 30, 1983, are not required to take corrective action pursuant to 15A NCAC 2L .0106(c) until their activity results in an increase in a substance in excess of groundwater quality standards at or beyond the facility's compliance boundary.

This the 18th day of December, 2012.

N.C. ENVIRONMENTAL MANAGEMENT COMMISSION


Stephen T. Smith, Chairman

CERTIFICATE OF SERVICE

This is to certify that this day the foregoing Declaratory Ruling was served upon the parties by placing a copy in the United States Mail, Certified Mail postage prepaid, or by Hand Delivery addressed to counsel of record as follows:

D. J. Gerkin, Esq.
J. Patrick Hunter, Esq.
22 South Pack Square, Suite 700
Asheville, N. C. 28801-3494

CERTIFIED MAIL
RETURN RECEIPT

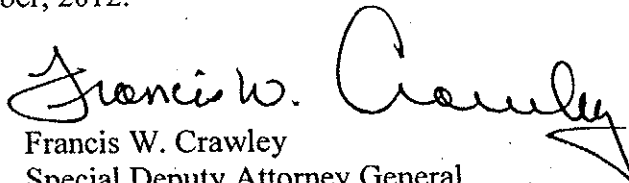
Charles D. Case, Esq.
Craig A. Bromby, Esq.
P. O. Box 109
Raleigh, N. C. 27602

CERTIFIED MAIL
RETURN RECEIPT

Kathryn J. Cooper, Esq.
Donald W. Laton, Esq.
NC Department of Justice
114 W. Edenton Street
Raleigh, N. C. 27602

HAND DELIVERY

This the 20th day of December, 2012.


Francis W. Crawley
Special Deputy Attorney General
Commission Counsel